U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 April 2006

CASE NO.: 2005-LHC-422

OWCP NO.: 08-108552

IN THE MATTER OF:

MORRIS BROUSSARD

Claimant

v.

UNITED MARINE ENTERPRISE, INC.

Employer

and

TEXAS MUTUAL INSURANCE COMPANY

Carrier

APPEARANCES:

ED W. BARTON, ESQ.

For The Claimant

CYNTHIA GALVAN, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a Section 22 modification claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Morris

Broussard (Claimant) against United Marine Enterprise, Inc. (Employer) and Texas Mutual Insurance Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 17, 2005, in Orange, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 10 exhibits, Employer/Carrier proffered 15 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs, due on February 10, 2006, were filed by Claimant and Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (2JX-1), and I find:

1. That the Claimant was injured on August 25, 1994.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on August 25, 1994.

5. That Employer/Carrier filed Notices of Controversion on April 10, 1995, June 22, 1995, August 14, 1995 and August 25, 2000.

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[1] References to the transcript and exhibits for this second formal hearing on modification are designated as follows to distinguish this record from the first record: Transcript: 2Tr.___; Claimant's Exhibits: 2CX-___; Employer/Carrier's Exhibits: 2EX-___; and Joint Exhibit: 2JX-___.

6. That informal conferences before the District Director were held on November 8, 1995, June 22, 1999, April 27, 2000 and September 28, 2004.

7. That Claimant received temporary total disability benefits, permanent total disability benefits and permanent partial disability benefits for a scheduled leg injury pursuant to the first Decision and Order in this matter which issued on May 15, 1998.

8. That Claimant's average weekly wage at the time of injury was $330.00.

9. Certain medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

10. That Claimant reached maximum medical improvement on July 11, 1995 and March 5, 2003.

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Section 22 Modification of the initial Decision and Order is warranted.

2. The nature and extent of Claimant's disability.

3. Entitlement to and authorization for medical care and services.

4. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Background

On May 15, 1998, a Decision and Order issued in this matter awarding Claimant benefits and reasonable and necessary medical care for injuries suffered from his work accident. It was determined that Claimant could select either Dr. Scott Kerr or Dr. Carl Beaudry as his treating physician for future medical care and treatment. Although certain restrictions were assigned by Drs. Fleming and Haig, Claimant was deemed capable of modified work. It was further concluded that Employer offered suitable alternative employment to Claimant on August 3, 1995, in the form of a modified toolroom position within its facility

at $10.00 per hour, thus Claimant had no loss of wage earning capacity. (2CX-4).

Claimant seeks modification of the prior Decision and Order averring that he has experienced a material change in condition, both medical and economic, such that he is now totally disabled and entitled to compensation and medical benefits. (2CX-5).

The Testimonial Evidence

Claimant

Claimant was 60 years old at the time of the modification hearing. (2Tr. 17). After the first Decision and Order, Claimant contacted Dr. Carl Beaudry for treatment, but he would not agree to treat Claimant. He returned to Dr. Scott Kerr, a chiropractor, who ultimately recommended he see Dr. Johnson, an orthopedist. (2Tr. 18). Claimant testified Dr. Johnson saw him on one occasion, but indicated he would not treat Claimant because his case was "too old" and he did not want to get involved. Dr. Kerr referred Claimant to Dr. Teuscher of the Beaumont Bone and Joint Clinic who saw him one time and referred him to Dr. Alvin Larkins. (2Tr. 19).

Claimant stated Dr. Larkins scheduled testing but the tests were cancelled for unknown reasons. (2Tr. 20-21). Dr. Larkins explained that he was going to send Claimant to Dr. Sachs, a pain management specialist, until the testing was approved by the insurance company. Claimant saw Dr. Sachs one time and received no results. Claimant moved thereafter to live with his son and to seek medical care in Houston, Texas. (2Tr. 22).

Claimant testified it was his understanding that the Department of Labor authorized him to change doctors to a physician in the Houston area. He began treating with Dr. Halbert of the Pain and Injury Center who had "various tests" conducted, prescribed biofeedback, physical therapy and medications, but without any relief provided. Claimant was then referred to Dr. Donovan. (2Tr. 23-24).

Claimant stated he first saw Dr. Donovan on December 5, 2000. MRIs of his shoulder, neck, and hand were performed and repeat left knee surgery and back surgery were done. Dr. McDonnell performed the back surgery. (2Tr. 25). Dr. Donovan released Claimant to return to Port Arthur, Texas, after his back surgery to continue care with a family doctor, Dr. St. Jewel. (2Tr. 26-27, 29).

Claimant applied for and was awarded Social Security disability benefits. At some point, his care was "switched" from "workers' comp to Medicare." (2Tr. 27). He underwent back surgery around January 2002. (2Tr. 28).

Claimant currently lives with his daughter. (2Tr. 29). He has no daily chores. He has problems sleeping and is in "so much pain and hurting all over." He does not move around much because if he moves around he starts hurting all over again. He sits and watches TV and "catnaps" all during the day. (2Tr. 30).

Claimant testified he spoke with Mr. Bernard of Employer about his condition. He indicated Mr. Bernard was encouraging, and he would "love to work for him," but the complications he has been having are not getting any better. He does not think he could go back to work. If he could work, he feels more obligated to return to work for Mr. Bernard and Employer. (2Tr. 32). He has not received anything in writing from Drs. Donovan or McDonnell stating he is able to work, even at light duty. (2Tr. 33). He continues to have low back pain and tightness in his legs and back; he is not as strong as he used to be. (2Tr. 34). He continues to take pain and inflammatory medications and has problems bending over. (2Tr. 35).

On cross-examination, Claimant affirmed he informed Dr. Haig at one point that he was not interested in having back surgery. However, his condition began getting worse while treating with Dr. Larkins and his son brought him to Houston to seek medical assistance. (2Tr. 38). When Dr. Donovan ordered an MRI and reviewed Claimant's problems, Dr. McDonnell was brought in to discuss back surgery. He was referred to Dr. Donovan by Dr. Halbert, a chiropractor in Houston. (2Tr. 39).

Claimant testified that he felt "somewhat better" after his back surgery and thought the back surgery was worthwhile. He stated that since the first hearing he has been having "more problems and more problems," "to roll over . . . is unbelievable. To go to the bathroom is; I'm having problems. I have actually urinated on myself because I couldn't unzip my pants because my hands spasm up and the pain I'm having in my hand." (2Tr. 40-41).

He confirmed it was important to accurately tell his doctors what happened to him. He did not know how far he fell, but knew he fell from the top of a hatch to the bottom and he

was working on a 25-foot ladder. (2Tr. 41-42). He did not think he was magnifying his symptoms with doctors. (2Tr. 42). He stated his receipt of Social Security disability benefits is not the reason why he does not want to return to work. He was on Social Security in the past, before his job accident, and returned to work. (2Tr. 42). He testified he is presently unable to try to return to work with Employer. He continues to treat with Dr. Kerr and is not treating with any orthopedic surgeon or pain specialist. (2Tr. 43). Dr. Kerr provides stimulation treatments for his neck, upper back and both shoulders. His medical bills are being submitted for payment to Social Security. (2Tr. 44).

Claimant testified that in the past he was electrocuted while working for Texaco Chemical and received Social Security disability benefits. Once his health got better, he voluntarily returned to work. (2Tr. 45). He affirmed he never informed Dr. Haig that he was not going back to work because he was receiving Social Security disability benefits. (2Tr. 46). He stated that if a person can go back to work, "they need to go back; . . . And if I could get back I would be back, a long time ago." (2Tr. 48).

A. B. Bernard

Mr. Bernard testified that Employer maintained Claimant on its payroll "almost indefinitely until we just didn't hear from him anymore." Claimant returned to work and was assigned to answer the phone, worked a couple of days and never returned. (2Tr. 51).

He confirmed a "positive" telephone conversation with Claimant that occurred the week before the instant hearing in which a light duty job offer was discussed. Claimant informed Mr. Bernard that he was not going to be able to accept it "because he wasn't in any condition to do so." The job was "shipping and receiving, which is sort of our tool room activities." Computer training would be provided to Claimant. (2Tr. 52, 55). Claimant informed Mr. Bernard that he "actually felt he couldn't come back to work." (2Tr. 54). Mr. Bernard had no reason to believe Claimant was not sincere about his being incapable of returning to work. (2Tr. 59).

Mr. Bernard also affirmed that he would work with Claimant if Dr. Donovan thought he should work his way back slowly into a job. (2Tr. 56). Claimant has an open invitation to return to work with Employer when he feels he can return. (2Tr. 59).

On April 27, 2005, Mr. Bernard sent Claimant a letter advising that Employer would welcome him back to employment and would accommodate his restrictions even on a part-time basis. Mr. Bernard also reiterated that Employer would have accommodated his restrictions in 1995 and would have done so in 2003 when he was released medically to modified work. He requested that Claimant contact him if he was interested in returning to work. (2EX-10).

The Medical Evidence

I have reviewed and considered the medical evidence summarized in the original Decision and Order. Only medical evidence generated after the initial Decision and Order will be treated in this modification Decision.

Beaumont Bone and Joint Institute

On April 6, 1999, Claimant was evaluated by Dr. David D. Teuscher, an orthopedist, at the request of Dr. Scott Kerr, a chiropractor,[2] regarding low back pain with bilateral lower extremity radiation. Dr. Teuscher opined that Claimant's symptoms were of such a chronic nature, without being able to seek treatment, that it would make sense to study him and consult with Dr. Al Larkins, a spinal surgeon. He ordered an MRI and plain x-rays of the lumbar spine. He observed that if Dr. Larkins believed Claimant was a surgical candidate, "they can proceed accordingly." If surgery was not an option, he opined either pain management or a chronic pain program may be indicated. (2CX-8, pp. 115, 117).

On April 28, 1999, Dr. Larkins examined Claimant upon the referral of Dr. Teuscher. Claimant complained of pain in his lower back radiating to his hips and legs. On physical examination, moderate paraspinal spasm was detected with normal straight leg raising tests. X-rays revealed narrowed L5-S1 disc space with degenerative changes demonstrated on MRI at L5-S1. Significant degeneration was noted at L4-5 and L3-4 with significant dissecation at those levels. (2CX-8, p. 116; 2EX-3, p. 1). Dr. Larkins's impressions were degenerative disc disease and lumbosacral radiculitis with mechanical pain. He felt a discogram and myelogram CT scan should be done "for the sake of completeness." He further opined that if the discogram showed

[2] Dr. Kerr's records and credentials are not contained in the record.

discordant pain, particularly at the degenerative levels, Claimant may be a candidate for a decompression and fusion. (2CX-8, p. 118).

Dr. Martin R. Haig

On September 14, 1999, Dr. Haig again examined Claimant at the behest of Employer/Carrier apparently in response to Dr. Larkins's recommendation for further diagnostic testing. On physical examination, Dr. Haig reported that he was not able to elicit true functional responses from Claimant on straight leg raises, who "complained bitterly of back pain." (2EX-4, p. 1). Dr. Haig took x-rays that reflected early arthritis with mild degenerative disc disease which he considered normal for an individual of Claimant's age. He further reported Claimant indicated he would not consider back surgery if the proposed testing showed surgery was necessary.

Dr. Haig opined Claimant suffered from a functional type of low back strain with symptoms, but no true findings and no orthopedic evidence of a ruptured disc. He did not consider Claimant a good surgical candidate and thought he could do light duty work.

In response to specific questions propounded to him, Dr. Haig opined that the degenerative changes evident on MRI were a result of aging and not related to Claimant's injury of August 25, 1994; he advised against a discogram and myelogram CT scan because Claimant indicated he did not want surgery and nothing would be achieved by performing the tests; he opined there was no sign of radicular pattern pain; and a decompression and fusion were unreasonable and unnecessary since Claimant "admits he is refusing any surgical treatment." (2EX-4, p. 2). In sum, he concluded that Claimant has decided to stop working and does not have any orthopedic evidence that he should refrain from doing light work. (2EX-4, p. 3).

Dr. Haig examined Claimant again on April 11, 2005, at the request of Employer/Carrier. He noted that Claimant was seen by Dr. Halbert, a chiropractor, in September 2000 who referred Claimant to Dr. Donovan in December 2000. An EMG and MRIs of the lumbar spine and knee were done. Claimant underwent both knee and spinal surgery. He reported Claimant believed his surgery helped him.

Dr. Haig opined the "massive surgery" Claimant had was not orthopedically necessary and was a result of the aging process;

the back surgery did not do much to alleviate Claimant's function because he was ambulatory in 1999 and could do light work and is still ambulatory. (2EX-8, pp. 1-2). He concluded Claimant was at maximum medical improvement (MMI) in 1999, was not at MMI while recovering from his back surgery, but had reached MMI again at the time of this exam. He opined the knee surgery may have been necessary if there was a recurrent torn cartilage present as the MRI showed; but the shoulder complaints were typical of a man his age and "should not be disturbed surgically." He further opined Claimant "could probably do light duty if he is well motivated." (2EX-8, p. 3).

Dr. Frank Barnes

On March 20, 2000, Dr. Barnes examined Claimant at the request of the U.S. Department of Labor (DOL) after review of various medical records including those of Dr. Haig. Claimant's chief complaints were pain in his neck, right elbow, "lumbar spine of extremities, hips" and both shoulders. (2EX-5, p. 1).

A physical exam was conducted with "some evidence of some probable symptom magnification in the fact that the distraction test and the sensory pattern both follow nonanatomic patterns." (2EX-5, p. 2). A review of Claimant's x-rays and MRI revealed only degenerative lumbar changes. His impression was that Claimant had "lumbar degenerative disc disease, cervical strain and torn meniscus left knee, operated."

In response to questions propounded by DOL, Dr. Barnes opined that: the lumbar spine x-ray was indicative of degenerative joint disease which could have been aggravated by his injuries, but could also be findings which occur in someone who has had no injury; a discogram and myelogram CT scan would not be helpful because he did not think surgical intervention would benefit Claimant; and Claimant had reached MMI. Finally, he concluded that any further medical care "would be palliative in the form of medications or treatment by a pain clinic." (2EX-5, p. 3).

Dr. William F. Donovan

Dr. Donovan, who is a board-certified orthopedic surgeon, was deposed by the parties on April 18, 2005. (2CX-7; 2CX-8, p. 1). He first examined Claimant on December 5, 2000, based on a

referral from Dr. Randall Halbert,[3] who thought he needed further tests and treatment. (2CX-7, pp. 6-7). Claimant presented with complaints of pain, weakness and giving-away of his left knee and pain in his low back with radiation into both legs. (2CX-7, pp. 7-8). Claimant related his job injury and past medical care. (2CX-7, pp. 8-9; 2CX-8, pp. 44-46).

A physical examination revealed positive straight leg raising tests bilaterally and slight atrophy of the left knee. (2CX-7, p. 10). Bending x-rays of the lumbar spine were taken which showed instability present at L4-5. X-rays of the left knee revealed "slight narrowing, medial joint space with some spur formation." Dr. Donovan was aware Carrier had controverted the claim and had not given authorization to any new doctors, only doctors who had treated Claimant in 1994. (2CX-7, pp. 11-12; 2CX-8, pp. 219-220). Dr. Donovan determined that Claimant was unable to do any kind of work because he needed appropriate diagnostic testing. (2CX-7, p. 20).

Dr. Donovan diagnosed Claimant with herniated discs at L3-4, L4-5 and L5-S1; lumbar spine instability; and a tear to the left medial meniscus. He noted that no bending x-rays had ever been performed on Claimant in the past. His treatment plan was to order an MRI of the left knee and the low back and a nerve test, an EMG and NCV. He noted no EMG or NCV test had ever been done on Claimant in the past. (2CX-7, pp. 12-13). The MRIs were obtained revealing a tear to the left medial meniscus of the left knee and an annular tear at L3-4 with a disc bulge, a disc bulge present at L4-5 and a disc bulge at L5-S1 pressing against the dural sac and S1 nerve roots. (2CX-8, pp. 174-175). He opined the tear to the medial meniscus and disc injuries were not part of the aging process. The nerve test conducted on December 8, 2000, revealed a bilateral L5-S1 nerve root irritation which was consistent with the findings on MRI of the lumbar spine. (2CX-7, p. 13; 2CX-8, pp. 176-178). He further opined the objective findings of the EMG and NCV were not caused by normal wear and tear in an individual of Claimant's age. (2CX-7, p. 14; 2CX-8, pp. 105-106).

Dr. Donovan referred Claimant to Dr. Mark McDonnell, a board-certified orthopedic surgeon, for evaluation on January 17, 2001. (2CX-7, pp. 14-15). Dr. McDonnell's diagnoses were post-traumatic instability at L4-5, herniated discs at L4-5 and L5-S1, lumbar spondylosis at L3 to S1 and a natural progression

[3] Dr. Halbert's records and credentials are not contained in the record.

of the initial injury in 1994. Dr. McDonnell recommended back surgery. (2CX-7, pp. 15-16; 2CX-8, pp. 50, 101-103).

Dr. Donovan continued to see Claimant every two to three months and advised him that he needed surgery, but could not get approval for treatment from Carrier. He stated that on July 31, 2001, Claimant was converted from a work injury patient to a Medicare patient. (2CX-7, p. 16; 2CX-8, p. 55).

On August 28, 2001, Dr. Donovan performed arthroscopic surgery of the left knee. His findings were a tear to the left medial meniscus, a tear to the left lateral meniscus, a dislocation to the left patella and chondromalacia to the left patella. (2CX-8, pp. 94, 199-203, 282-284). He opined that surgery performed in 2001 was related to a continuation of problems and worsening conditions to Claimant's left knee from his 1994 job accident. (2CX-7, pp. 17-18; 2CX-8, p. 15).

Dr. Donovan continued to follow Claimant monthly after the knee surgery which was getting better. Claimant complained of persistent pain to the low back with radiation down his legs. (2CX-7, p. 21). He continued Claimant in a totally disabled status and unable to work from December 5, 2000 through April 28, 2003. (2CX-8, pp. 71, 100, 206-212, 215-216, 218, 225, 226, 271-272, 275, 277-278, 282, 291-293).

Objective testing revealed nerve root irritation at the L5-S1 level which meant, according to Dr. Donovan, that Claimant had a herniated disc at L5-S1. (2CX-7, p. 19). Instability made the herniated disc worse and "caused an unstable situation to the lumbar spine." Claimant's symptoms progressively got worse from 1994 to 2001. His symptoms, consistent with the MRI findings, were pain to the low back, pain into the legs and clinical findings of absent ankle jerk and positive straight leg raises bilaterally. (2CX-7, p. 20).

A lumbar discogram of October 2, 2001, showed ruptured discs at L3-4, L4-5 and L5-S1. (2CX-8, pp. 166-171). On October 12, 2001, repeat nerve test and EMG and NCV revealed a worsening of the back with bilateral L5-S1 lumbar radiculopathy. (2CX-8, pp. 172-173). Dr. McDonnell scheduled decompression and fusion back surgery for January 24, 2002, which confirmed the discogram findings. (2CX-7, p. 21; 2CX-8, pp. 93, 194-198; 2CX-9, pp. 1-2, 6, 9).

Dr. Donovan testified that Claimant was much improved with no hip or leg pains three weeks after back surgery. (2CX-7, p.

22). Claimant continued to see Dr. McDonnell or his associate, Dr. Fogel, after surgery. On January 27, 2003, Claimant underwent another surgical procedure to remove his symptomatic hardware at which time his fusion was well-healed. (2CX-7, pp. 23-24; 2CX-8, pp. 87, 191-193).

Dr. Donovan last saw Claimant on April 28, 2003, when Claimant reported his low back and left knee were good. Claimant also complained of developing neck and right shoulder pain which was injected with cortisone on March 19, 2003, providing temporary relief. (2CX-7, p. 25). On March 26, 2003, MRIs of the right shoulder, right hand and right wrist were conducted. (2CX-8, pp. 151-157). Arthroscopic surgery was recommended for the right shoulder, but Claimant refused surgery. Dr. Donovan opined that Claimant's right shoulder and neck complaints were related to his 1994 job injury because he complained of pain in both shoulders and neck pain in the emergency room after his accident. (2CX-7, pp. 26-27). A cervical MRI was ordered on March 11, 2003, which showed a ruptured disc at C4-5 impinging on the spinal cord, however Dr. Donovan made no specific recommendations about treatment. (2CX-7, pp. 27-28; 2CX-8, p. 158). He recommended that Claimant follow-up with his family physician in Beaumont, Texas.

He opined that Claimant reached MMI with respect to his left knee and lumbar area on March 5, 2003. (2CX-7, p. 28). Following his knee and back surgeries, the radicular pain down both legs had disappeared and the locking, catching and giving-away of the left knee was much better. Dr. Donovan indicated Claimant would still have some back and knee pain or discomfort because of arthritis. Regarding restrictions or limitations because of Claimant's back and knee problems, Dr. Donovan testified that Claimant needs to avoid repetitive lifting, bending, pushing/pulling, climbing, crawling, walking on uneven ground; sitting more than one hour at a time, but no more than four hours in an eight-hour workday; and avoid prolonged standing more than an hour, but no more than four hours in an eight-hour day. Claimant's weight restrictions were about 15 pounds which would limit him to "modified light work to sedentary." (2CX-7, pp. 28-30).

In response to the April 11, 2005 opinions of Dr. Haig, Dr. Donovan disagreed that (1) lumbar instability and herniated discs are related to the aging process and (2) that the back surgery was unnecessary because it did not help Claimant, since the radicular pain component was removed after surgery. (2CX-7, p. 31). He disputed Dr. Haig's opinion that nothing had been

gained by the lumbar surgery since the surgery had corrected the instability and removed the ruptured disc that was pressuring the nerve and causing radiculopathy. (2CX-7, pp. 32-33).

Contrary to Dr. Haig, he opined that Claimant's right shoulder impingement syndrome and rotator cuff tear are the type of injuries caused by his accident. (2CX-7, p. 36). He would assign an impairment rating "closer to 25%" to the left lower extremity after a second surgery "because both medial and lateral meniscus was involved" pursuant to the AMA Guidelines. (2CX-7, p. 37).

Dr. Donovan stated that Claimant will need follow-up treatment and x-rays for his left knee, neck and right shoulder, a total left knee "orthoplasty" in the future and "scope surgery to his right shoulder." (2CX-7, p. 38).

On cross-examination, Dr. Donovan clarified that Claimant had three herniated discs not degenerative discs and arthritis of the facet joints which is totally different from instability and herniated discs. A person with lumbar instability would have continual back pain in the absence of surgery. (2CX-7, p. 40). He disagreed with Drs. Haig, Fleming and Barnes who opined that back surgery was unnecessary because of the "paucity of tests that they had" to make such a clinical decision. They did not have bending x-rays, EMGs, discograms or myelograms on which to base their opinions. He explained that Dr. Haig had elicited positive straight leg raises in 1994 which should have indicated the need for further testing. Dr. Barnes's opinion was "backwards" in that he concluded surgery would not benefit Claimant, and, thus, there was no need for further testing, rather than finding that testing might help determine the need for surgery. Dr. Fleming's notes reflect a cursory exam of Claimant's back. (2CX-7, p. 41).

Dr. Donovan further explained that the left knee surgery of 2001 was needed and related to the 1994 job injury because it was a continuation of the tear to the medial meniscus which worsened and affected the mechanics of the knee and caused a problem to the lateral joint. (2CX-7, p. 43). Recuperative time for the 2001 surgery performed on Claimant is "a good six months," placing his MMI at April 2002. (2CX-7, pp. 44-45). Claimant will have a natural progression of arthritis in his left knee. (2CX-7, p. 45).

Dr. Donovan testified that the purpose of the lumbar surgery was to stabilize the spine and decompress and get

pressure off the sciatic nerve on the right and left side. He believed both functions were achieved. Although Claimant may still have back pain, the lumbar radiculopathy into the hip and leg was removed. (2CX-7, p. 46). Claimant reported feeling better after the initial and hardware removal surgery. (2CX-7, p. 47). Dr. Donovan further disagreed with Dr. Haig that the surgery was "massive," but rather the appropriate surgery to perform given Claimant's objective findings. (2CX-7, pp. 48-49). He agreed, however, that the aging process affected the facet joints, but not the discs or the instability. The latter two problems were caused by the job injury and the surgery was performed to correct the instability and disc problems. (2CX-7, p. 50).

He confirmed that Claimant should be physically capable of sedentary to modified light work with the assistance of a vocational specialist. (2CX-7, p. 52). He would release Claimant to work in a position provided by Employer if the job accommodated his restrictions. (2CX-7, pp. 54-55). He opined, however, that Claimant could not work on a consistent, regular basis and be depended upon to show up five days a week over an extended period of time given his knee, back, neck, shoulder and wrist problems. (2CX-7, p. 57). Claimant should start in part-time employment with accommodations. (2CX-7, p. 58).

The Vocational Evidence

Lori J. McQuade

Ms. McQuade, who is a certified vocational rehabilitation counselor, was accepted as an expert in her field. She reviewed Claimant's medical records, the prior and present testimony, prior vocational reports and the deposition of Dr. Donovan in preparation for her report and testimony. She opined that Claimant's former job was classified as medium in exertional demand, but that his present restrictions were within the range of light work. (2Tr. 62-63). She observed that Dr. Donovan opined Claimant should consider slowly transitioning into light work, "more on [a] part time basis until he was able to work back to a full time capacity." She affirmed that both Drs. Haig and Donovan had released Claimant for work. (2Tr. 63).

She prepared a vocational report and labor market survey in which she identified jobs that were consistent with Claimant's medical releases with a range of wages from minimum wage to $11.00 per hour. She opined that vocationally Claimant's current restrictions "are not that different from what they were

during the first hearing in this matter." She would advise Claimant to accept the job offer with Employer from Mr. Bernard which she considered "an ideal opportunity," that remains available with an option of providing necessary training. (2Tr. 64-65).

She further affirmed generally that the jobs listed in her labor market survey are the "type of jobs that one would expect to have found back in 1997, back in 1999 and back in 2003." (2Tr. 65). The identified jobs average in wages from $6.50 to $7.50 per hour. The positions consist of the following: cashier positions, parking attendant, van driver, telecommunications operator trainee, summer food assistant, arts and crafts instructor, playground supervisor, car lot porter, and cart attendant. (2EX-11, pp. 5-6). The specific duties, demands, terms and nature of the jobs are not further explained. She opined that Claimant could reasonably compete for such positions which were considered appropriate for him. She did not know what the jobs paid on August 25, 1994, when Claimant was injured. (2Tr. 70).

The Contentions of the Parties

Claimant contends modification of the original Decision and Order is warranted and that he is entitled to temporary total disability compensation benefits. Subsequent to the initial formal hearing, Claimant underwent a repeat knee surgery and back surgery through Medicare after Employer/Carrier denied authorization to treat with Dr. Donovan. He reached maximum medical improvement on March 5, 2003, from both surgeries. Claimant argues Dr. Donovan has opined that he cannot work in any capacity, even light duty positions on a consistent basis.

Employer/Carrier contend the majority of physicians who examined Claimant have opined that he was not a surgical candidate and did not need surgery. They further contend that the repeat knee and back surgeries were unauthorized and not the responsibility of Employer/Carrier. They argue modification should be denied because Claimant's physical restrictions have not changed and he can still perform light duty work, thus his work capacity in the labor market has not changed since the original Decision and Order.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel,

346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 651 F.2d 898, 900, 14 BRBS 63 (CRT) (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, 88 S.Ct. 1140, reh'g denied, 391 U.S. 929 (1968).

A. Applicability of Section 22 Modification

Section 22 of the Act provides the only means for changing otherwise final decisions on a claim; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. See Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The rationale for allowing modification of a previous compensation award is to render justice under the Act.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984).

An initial determination must be made whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. Duran v. Interport Maintenance Corp., 27 BRBS 8 (1993); Jensen v. Weeks Marine, Incorporated, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is

limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. Id. at 149.

It is well-established that Congress intended Section 22 modification to displace traditional notions of **res judicata**, and to allow the fact-finder to consider any mistaken determinations of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection upon evidence initially submitted." O'Keefe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 92 S.Ct. 405 (1971), reh'g denied, 404 U.S. 1053 (1972). An administrative law judge, as trier of fact, has broad discretion to modify a compensation order. Id.

A party may request modification of a prior award when a mistake of fact has occurred during the previous proceeding. O'Keefe, supra at 255. The scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. See Rambo I, supra at 295; Banks v. Chicago Grain Trimmers Association, Inc., supra at 465. However, it is clear that while an administrative law judge has the authority to reopen a case based on any mistake in fact, the exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice. Kinlaw v. Stevens Shipping and Terminal Company, 33 BRBS 68, 72 (1999). A mistake in fact does not automatically re-open a case under Section 22. The administrative law judge must balance the need to render justice against the need for finality in decision making. O'Keefe, supra; see also General Dynamics Corp. v. Director, OWCP [Woodberry], 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Modification based upon a change in conditions or circumstances has also been interpreted broadly. Rambo I, supra at 296. There are two recurring economic changes which permit a modification of a prior award: (1) the claimant alleges that employment opportunities previously considered suitable alternative are not suitable; or (2) the employer contends that suitable alternative employment has become available. Blake v. Ceres, Inc., 19 BRBS 219 (1987). A change in a claimant's earning capacity qualifies as a change in conditions under the Act. Rambo I, supra at 296. Once the moving party submits

evidence of a change in condition, the standards for determining the extent of disability are the same as in the initial proceeding. Id.; See also Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998); Vasquez, supra at 431.

However, Section 22 is not intended as a basis for re-trying or litigating issues that could have been raised in the initial proceeding or for correcting litigation strategy/tactics, errors or misjudgments of counsel. General Dynamics Corp. v. Director, OWCP [Woodberry], supra; McCord v. Cephas, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976); Delay v. Jones Washington Stevedoring Company, supra, at 204.

The U. S. Department of Labor (DOL) has consistently advanced a view that Section 22 articulates a preference for accuracy over finality in judicial decision making. See Kinlaw, supra at 71; Old Ben Coal Company v. Director, OWCP [Hilliard], 292 F.3d 533, 36 BRBS 35, 40-41 (CRT)(7th Cir. 2001). DOL has maintained in other modification proceedings that as Section 22 was intended to broadly vitiate ordinary **res judicata** principles, the interest in "getting it right," even belatedly, will almost invariably outweigh the interest in finality. Kinlaw, supra at 71.

B. The Threshold Requirement under Section 22 of the Act

I find Claimant has met the threshold requirement for modification under Section 22 of the Act by presenting evidence of a change in his physical/medical and economic condition. Subsequent to the issuance of the original Decision and Order in this matter, Claimant underwent diagnostic testing, a repeat left knee surgery and a lumbar decompression and fusion. He was considered totally disabled and unable to work from December 5, 2000 to April 28, 2003, while recovering from his surgeries and reached MMI on March 5, 2003. I find this sufficient to constitute a change in Claimant's physical/medical and economic condition. Consequently, I find and conclude that Claimant has presented new information to warrant consideration of modification under Section 22 of the Act.

Therefore, balancing the need to render justice under the Act against the need for finality in decision making, I hereby grant Claimant's motion and reopen the record to consider modification of the prior Decision and Order.

Although Claimant also contends a mistake of fact exists in that he "has not reached MMI as testified to earlier by his

treating physician," I find there is no probative, cogent evidence supporting such an argument. (2CX-5, p. 2). Drs. Fleming, Haig and Veggeberg who evaluated Claimant prior to the initial Decision and Order agreed that MMI had been reached by July 11, 1995. As discussed below, I find Claimant suffered a temporary deterioration in his condition after knee and lumbar surgeries while recuperating which resulted in MMI being reached on March 5, 2003. Such a temporary change does not negate the initial determination of MMI or a state of permanency. See McCaskie v. Aalborg Ciserv Norfolk, Inc., 34 BRBS 9, 12-13 (2000).

C. The Compensability of the Right Shoulder and Cervical Spine

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel

Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant contends that he injured his right shoulder and neck in his 1994 job accident and a mistake of fact exists in that such injuries were not determined in the original Decision and Order. On August 25, 1994, when he presented to Park Place Medical Center emergency room after his fall, he complained of pain in **both** shoulders. (CX-2, p. 6). No x-rays of the shoulders were ordered. (CX-2, pp. 7-9). Claimant did not specifically complain of cervical pain or problems. Dr. Fleming ordered x-rays of the cervical spine on August 30, 1994, which revealed no pathology according to Dr. Haig.

Apparently Claimant's shoulder and neck problems were no longer symptomatic after August 1994 since no further shoulder and neck complaints were presented or treatment sought by Claimant until March 20, 2000, when he was examined by Dr. Barnes and subsequently on March 19, 2003, when Dr. Donovan administered a cortisone injection to his shoulder. Dr. Barnes diagnosed a cervical strain but offered no opinion about causation. Dr. Donovan treated Claimant for over two years before he complained of shoulder and neck pain which were attributed to the work accident.

Based on the foregoing, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain to his shoulders on August 25, 1994, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

However, I find Claimant has failed to present any credible evidence that his alleged cervical complaints, advanced for the first time six years after his job accident, were in any way related to his August 25, 1994 work accident.

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor

aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

Employer/Carrier acknowledge there is record evidence of Claimant's complaints of shoulder pain while at the emergency room following his August 25, 1994 work accident. They note Claimant failed to complain about his alleged shoulder injuries thereafter and did not allege a shoulder or cervical injury when he filed his compensation claim. (2CX-2, p. 3). Dr. Haig attributed Claimant's shoulder complaints to age and not his injury which arguably rebuts the Section 20(a) presumption.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, all of the evidence of record must be weighed to resolve the causation issue. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Based on a weighing of all the evidence of record, I find Employer/Carrier are not responsible for medical treatment for Claimant's shoulder complaints which surfaced six years after his injury. Dr. Donovan's causation opinion is based on Claimant's history. He attributes poor workup by past treating physicians as a reason for not detecting Claimant's problem before 2003. I regard his opinion as self-serving and

unreasoned since he treated Claimant for over two years before a complaint about shoulder and neck pain even surfaced. The record is devoid of any complaints by Claimant about his shoulders and neck from August 1994 to March 2000. Accordingly, I find and conclude that there is no nexus between Claimant's work accident and his shoulder and cervical complaints voiced six years later. I further find and conclude that Employer/Carrier are not responsible to Claimant for any medical care for his shoulder and cervical complaints or condition.

D. Nature and Extent of Disability

I previously found that Claimant suffered from compensable injuries to his left knee and lower back. Claimant was found to be temporarily and, thereafter, permanently totally disabled for a period of time until he was offered suitable alternative employment with Employer on August 3, 1995, at which time he no longer had a loss of wage earning capacity. He was considered to have a sedentary to light, modified work capacity.

In this modification proceeding Claimant contends he is now totally disabled and unable to work on a regular and consistent basis. The burden of proving the nature and extent of his disability continues to rest with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir.

1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Notwithstanding the issue of compensability of medical treatment and surgical procedures, the record establishes that during the period from December 5, 2000 to April 28, 2003, Claimant was taken off all work and was considered totally disabled by Dr. Donovan. No other physician of record opined that Claimant had the capacity to work during the above time period. Even Dr. Haig agreed that while convalescing from back surgery, Claimant was not at MMI and presumably not able to work. I find and conclude that Claimant was totally disabled after his left knee and back surgeries procured from Dr. Donovan and Dr. McDonnell.

The record is devoid of any evidence that Claimant was not capable of performing sedentary to modified light work before December 5, 2000. Accordingly, I find and conclude that he continued to have the physical capacity to perform the suitable alternative tool room position offered by Employer on August 3, 1995, as discussed in the original Decision and Order.

Whether such surgeries were authorized or not, it is axiomatic that a claimant is entitled to an award of disability compensation while he is otherwise incapacitated from returning to gainful employment due to a work-related injury or its residuals unless his continued disability is due to an intervening cause. No intervening cause has been established in this case. See Wheeler v. Interocean Stevedoring, Incorporated, 21 BRBS 33, 36 (1988). Employer/Carrier do not argue otherwise and have cited no authority to the contrary. Therefore, I find

Claimant is entitled to total disability compensation benefits from December 5, 2000 to April 28, 2003, when Dr. Donovan opined he could perform modified work, based on his average weekly wage of $330.00. I further find Claimant is permanently totally disabled because he had previously reached a state of permanency in 1995 and that his underlying permanent disability is not altered during periods of deterioration in condition, which are temporary in nature, due to subsequent surgery. See, e.g., Leech v. Service Engineering Co., 15 BRBS 18 (1982).

E. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). **Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs.** See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Based on the record evidence developed at this modification proceeding, I find that after reaching MMI on March 5, 2003, Claimant retained the capacity to work at a sedentary to light, modified level based on the well-reasoned opinion of Dr. Donovan. He clearly could not return to his former medium level job as an outside machinist. Furthermore, Dr. Donovan has opined that Claimant cannot work on a consistent, regular basis, eight hours per day and should begin work on a part-time basis initially.

Dr. Donovan restricted Claimant to no more than one hour at a time of sitting and standing for up to four hours in an eight hour day. Thus, I find and conclude that Claimant had a work capacity of sedentary to modified light work on a part-time basis, which I further conclude, based on the instant record is equivalent to a work capacity of four hours a day or 20 hours per week.

The jobs identified by Ms. McQuade in her labor market survey of April 27, 2005, are not considered suitable alternative employment for Claimant. As previously noted, no specifics about the duties, terms, demands and nature of the jobs were provided, nor is it clear whether such jobs were available on a part-time basis.

However, I find that Mr. Bernard offered Claimant a "tool room" job with Employer within his restrictions and further offered to accommodate his limitations including part-time work. Since Employer offered Claimant a tool room position that was considered compatible with his restrictions in 1995, which he attempted for a few days, I find this job offer also suitable and appropriate for Claimant. See Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685 (5th Cir. 1996). Given Claimant's high school education, his past work experiences and his general demeanor and articulation, I find he has the ability to complete the computer training necessary for the job identified by Employer. Moreover, I further find the job offered by Employer was available as of the date of Claimant's release for part-time work on April 28, 2003. Thus, Claimant remained permanently totally disabled until April 27, 2003.

Effective April 28, 2003, Claimant became permanently partially disabled based on his ability to do part-time modified work made available by Employer. The only record evidence of the wage rate for such a position is found in the original Decision which reflects an $11.00 per hour rate in 1997. Such an hourly rate yields a wage earning capacity of $220.00 ($11.00/hour x 20 hours) and a compensation rate of $73.34 per week ($330.00 [AWW] - $220.00 = $110.00 x .6667 = $73.337).

It was Employer/Carrier's burden to establish suitable alternative employment for Claimant when he reached MMI and was released to modified employment. As noted the availability of suitable alternative employment may be applied retroactively to the date of MMI when a specific showing of availability and the terms and nature of the employment are demonstrated, as here.

Therefore, I find Employer met its burden on April 27, 2003, by demonstrating the availability of the shipping and receiving position at its facility which would have been modified to accommodate Claimant's restrictions.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an

employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907(d)(1)(A); Wheeler v. Interocean Stevedoring Incorporated, supra. Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

The original Decision and Order discussed Claimant's difficulties receiving authorization and approval for medical treatment from Employer/Carrier. This modification proceeding highlights a continuing saga of Claimant's efforts to gain medical treatment for his job injuries.

Claimant was approved to treat with a chiropractor or orthopedist, Drs. Kerr and Carl Beaudry, respectively. Subsequent to the initial Decision and Order, Claimant attempted to treat with Dr. Carl Beaudry, but could not because Dr. Beaudry would not accept workers' compensation cases. He treated with Dr. Scott Kerr. The record appears incomplete regarding the sequence of Claimant's treatment and the providers from whom he sought or was referred for treatment. In April 1999, Claimant was referred by Dr. Kerr to Dr. Teuscher who sought the opinion of a spinal surgeon, Dr. Larkins. (2CX-2, p. 21). Dr. Larkins recommended diagnostic testing which prompted Employer/Carrier to seek an opinion from Dr. Haig who disagreed with the recommendation since Claimant purportedly did not want surgery. DOL assigned an impartial examiner, Dr. Barnes, who also concluded that diagnostic testing and surgery were not necessary since arguably Claimant's condition was degenerative in nature, but pain management was recommended. Diagnostic testing was not accomplished.

On April 27, 2000, based on the report of Dr. Barnes, the District Director recommended that "further testing (sic) nor

surgery is warranted and that employer/carrier authorize claimant to continue his pain management treatment with Dr. Sacks or in the alternative authorize claimant to continue his pain management treatment with a clinic in Houston since claimant has relocated to this area." (2EX-6).

In 2000, Claimant had relocated to the Houston, Texas area and sought approval to treat with a pain management specialist in that area. Notwithstanding the Decision and Order, Employer/Carrier approved pain treatment only. (2EX-9). Thereafter, Claimant apparently received treatment from Dr. Halbert, a chiropractor, and Vista Pain Management Clinic in Houston. (2CX-8, p. 110). On August 25, 2000, despite the original Decision and Order and the recommendation of the District Director, Employer/Carrier controverted all medical treatment with Dr. Halbert, the Pain & Injury Center and Dr. William Donovan. (2CX-2, p. 18; 2EX-15).

At the informal conference on September 28, 2004, Claimant claims he was authorized to treat with Dr. Donovan. He requested that he be permitted to continue treating with Dr. Donovan. (2CX-2, p. 21). Dr. Donovan's billings have obviously not been paid by Employer/Carrier. (2CX-8, p. 2). The parties were allowed thirty days to resolve the issue after which the Director would make a "recommendation on modification and medical care." (2EX-7, p. 3). On October 26, 2004, Employer/Carrier advised the District Director that pain management was authorized, but disputed any authorization to treat with Dr. Donovan and further disputed the work-relatedness of any subsequent surgeries performed on Claimant. (2EX-5, pp. 6-7).

On November 5, 2004, based on the foregoing, the Director concluded that since Dr. Barnes had previously opined that surgery was not necessary, Dr. Donovan's treatment and subsequent surgeries are considered self-procured pursuant to Section 7(d)(1) of the Act. (2EX-7, p. 1). Employer/Carrier rely upon the recommendation of the Director in continuing to dispute treatment by Dr. Donovan and any recommended surgeries.

The Act provides that active supervision of a claimant's medical care is performed by the Secretary of Labor and her delegates, the district directors. However, the Board has noted "there are issues with regard to medical benefits which remain in the domain of the administrative law judges. Disputes over whether authorization for treatment was requested by the claimant, whether the employer refused the request for

treatment, whether the treatment obtained was reasonable and necessary, or whether a physician's report was filed in a timely manner, are all factual matters within the administrative law judge's authority to resolve." Weikert v. Universal Maritime Service Corporation, 36 BRBS 38, 39-40 (2002).

The original Decision and Order found that Claimant was entitled to treatment from a chiropractor or orthopedist. The orthopedist would not treat Claimant. Through referrals from Dr. Kerr and UTMB, Claimant was seen by several orthopedists, but received little or no treatment or diagnostic testing. Once in Houston, he treated with Dr. Halbert who referred him to Dr. Donovan.

Under Section 7(b) and (c) of the Act, Employer/Carrier bear the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the Act. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79, 86 (CRT)(5th Cir. 1986), cert. denied, 479 U.S. 826 (1986). Employer/Carrier controverted treatment as noted above. (See 2EX-7, p. 4). Dr. Donovan testified, without contradiction, that his office contacted Carrier's adjuster, Michael Oakes on November 30, 2000, who denied Dr. Donovan authorization to treat Claimant. (2CX-7, pp. 11-12; 2CX-8, p. 19).

In the present matter, I find that Employer/Carrier's controversion of treatment with Drs. Halbert and Donovan constituted a denial of treatment with such providers which was buttressed by the November 30, 2000 telephonic denial of Mr. Oakes. Moreover, given the District Director's rejection of further diagnostic testing and surgical intervention, upon which Employer/Carrier rely, and Employer/Carrier's refusal to authorize treatment with any new doctors, it would undoubtedly have been futile for Claimant to seek (1) a change of physician; (2) approval for diagnostic testing; or (3) approval for medical treatment and care, to include surgery. I so find. See Atlantic & Gulf Stevedores, Inc. v. Neuman [Walker], 440 F.2d 908 (5th Cir. 1971).

Thus, Claimant was released from the obligation of continuing to seek Employer/Carrier's approval for medical treatment. Pirozzi, supra. He needed only to establish that the treatment subsequently procured on his own initiative was necessary for treatment of his injury to be entitled to treatment at Employer/Carrier's expense. Rieche, supra at 275.

The remaining issues are whether the left knee surgery and the lumbar surgeries were reasonable and necessary for treatment of Claimant's work injuries. I find that the surgeries were reasonable and necessary and thus the responsibility of the Employer/Carrier.

(1) The Left Knee Surgery

Dr. Donovan performed arthroscopic surgery on Claimant's left knee because of a continuation of problems and the worsening condition of Claimant's knee. He opined the left knee problems were related to Claimant's 1994 job accident/injury since they were a continuation of the tear to the medial meniscus from his first knee surgery by Dr. Fleming. He further opined that the tear of the medial meniscus worsened and affected the mechanics of the knee and caused problems with the lateral joint.

Dr. Haig opined that the left knee surgery may have been necessary if there was a recurrent torn cartilage present as shown on MRI. During surgery, Dr. Donovan confirmed the tear to the left medial meniscus, a tear to the left lateral meniscus, a dislocation of the left patella and chondromalacia to the left patella.

I find, based on the foregoing, that Claimant's August 28, 2001 left knee surgery by Dr. Donovan was reasonable and necessary for treatment of his 1994 work-related injury and that Employer/Carrier are responsible for such treatment and surgery.

Dr. Donovan rationally concluded that Claimant's permanent impairment after a second knee surgery increased from 18% to 25%. His opinion is uncontradicted. Accordingly, Employer/Carrier are responsible for an additional 7% permanent impairment to a scheduled body part, the left knee, pursuant to Section 8(c)2).

(2) The Lumbar Surgeries

Drs. Haig and Barnes concluded that further diagnostic testing to determine the need for back surgery was not warranted because either Claimant did not want back surgery at the time or surgical intervention would not benefit Claimant. Both physicians found that Claimant suffered from degenerative changes of the lumbar spine related to the aging process. Because of their opinions, the discogram and myelogram sought by

Dr. Larkins was not approved. No bending x-rays, EMGs or NCVs were done.

After an abnormal discogram conducted on October 2, 2001, Dr. Donovan diagnosed Claimant with three herniated discs, nerve root irritation and lumbar instability which he related to the 1994 job accident. He further opined that none of the conditions were caused by degenerative changes, normal wear and tear or the aging process. He disagreed with Drs. Haig and Barnes because their opinions were not based on diagnostic tests conducted after and available to Drs. Donovan and McDonnell. Neither Dr. Haig nor Dr. Barnes reviewed the subsequent diagnostic testing. Dr. Donovan observed that their clinical opinions were based on a "paucity" of information.

I find and conclude that Dr. Donovan's opinions regarding Claimant's lumbar treatment and the necessity for surgery are better reasoned than those of Drs. Haig, Barnes and Fleming. Dr. Donovan and Claimant testified that Claimant's radicular symptoms were resolved by the lumbar surgery, even though Claimant will continue to experience some ongoing back pain. Dr. Donovan also opined that with the fusion Claimant's lumbar instability has been stabilized. Clearly, the lumbar surgery was reasonable and necessary treatment for Claimant's 1994 work-related injury for which Employer/Carrier are responsible.

I further find and conclude that the subsequent symptomatic hardware removal surgery was also reasonable and necessary medical treatment and also causally related to the lumbar surgery and the 1994 job accident. No physician has opined otherwise. Therefore, Employer/Carrier are also responsible for medical billings associated with this surgery.

I am not persuaded by Employer/Carrier's argument that Dr. McDonnell's opinion about Claimant's lumbar surgery should be discredited because of his suspension by the Texas Workers' Compensation Commission (TWCC), which has been challenged by Dr. McDonnell. There is no evidence in the instant case that Dr. McDonnell provided substandard care or performed unnecessary surgery which formed the basis of his debarment from TWCC's list of approved physicians.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending

compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d). Employer/Carrier's liability for penalties ceases on the date of filing of its notice of controversion or on the date of an informal conference. See Harrison v. Todd Pacific Shipyards Corporation, 21 BRBS 339, 347 (1988).

In the present matter, Claimant filed a timely modification claim after May 19, 1999, contending he was totally disabled and entitled to compensation and medical benefits. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due, or in this case, December 5, 2000.[4] Thus, Employer was liable for Claimant's permanent total disability compensation payment on December 19, 2000. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by January 2, 2001, to be timely and prevent the application of penalties.

Employer/Carrier filed a Notice of Controversion on August 25, 2000, controverting "all medical treatment with Dr. Halbert, Pain & Injury Center, Dr. William Donovan and Dr. Berliner," but did not specifically controvert Claimant's entitlement to compensation. However, an informal conference was held on Claimant's Section 22 modification request on June 22, 1999.

Consequently, I find and conclude that, although Employer/Carrier did not file a timely notice of controversion on August 25, 2000 since entitlement to compensation was not raised, nevertheless they are not liable for Section 14(e) penalties since an informal conference was held on June 22, 1999.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation

[4] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[5] A service sheet showing that service has been made on all parties,

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[5] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **November 19, 2004**, the date this matter was referred from the District Director.

including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for permanent total disability from December 5, 2000 to April 27, 2003, based on Claimant's average weekly wage of $330.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent partial disability from April 28, 2003, and continuing based on two-thirds of the difference between Claimant's average weekly wage of $330.00 and his reduced weekly earning capacity of $220.00 or a weekly compensation rate of $73.34 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability, due to his subsequent left knee surgery and scheduled injury, at a rate of 2/3 of his average weekly wage for an additional period of 20.2 weeks (7% of the 288 weeks provided under the schedule). 33 U.S.C. § 8(c)(2) and (19).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2001, for the applicable period of permanent total disability.

5. Employer/Carrier shall continue to pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 25, 1994, work injury to his left knee and back, consistent with this Decision and Order, pursuant to the provisions of Section 7 of the Act.

6. Employer shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961

(1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 12th day of April, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.